

DUPLICATE

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MAY 31 1989

Federal Communications Commission
Office of the Secretary

BEFORE THE
Federal Communications Commission

WASHINGTON, D.C. 20554

In re Application of)
CAPROCK EDUCATIONAL BROADCASTING) File No. BMPED-880328MM
FOUNDATION)
For Modification of)
Construction Permit)
Lubbock, Texas)

To: The Chief, Mass Media Bureau

10:40 AM '89
COMMUNICATIONS

REPLY TO OPPOSITION TO PETITION TO DENY

Williams Broadcast Group (Williams), licensee of Station KJAK(FM), at Slaton, Texas, by its attorneys and pursuant to Section 1.45(b) of the Commission's Rules, hereby submits its Reply to the Opposition to Petition to Deny (Opposition), filed by Caprock Educational Broadcasting Foundation (Caprock), on May 9, 1989.¹ In support whereof, the following is shown.

Misery loves company, and, through its Opposition, Caprock characteristically desires to share the blame for its

¹On May 22, 1989, Williams filed with the Commission a Request for Extension of Time, seeking leave to file the instant pleading on Friday, May 26, 1989. On May 26, 1989, Williams filed a Further Request for Extension of Time, setting May 31, 1989, as the date for filing its responsive pleading.

transgressions with virtually everyone. First, Caprock would have the Commission believe that its egregious violations are Williams' fault, because Williams did not police Caprock's operations and warn Caprock of the consequences of its unlawful activities before reporting to the Commission. Caprock even suggests that "[i]f sanctions are to be imposed here, they ought to be imposed equally against Williams." *Opposition* at 9.

Caprock apparently would blame the Commission for its problems as well; the former permittee² does not feel that it should be subject to the Commission's Rules and policies because it decided to prosecute its application and commence construction without consulting an attorney. Notably, however, Caprock does not deny violating the statutes and rules set forth by Williams in its Petition; rather, Caprock claims former ignorance, apologizes and promises never to do such things again. *Opposition* at 3. Unfortunately, Caprock has never stopped. And, Caprock must be stopped.

Caprock's desperate attempts to deny the seriousness of its violations and its meager excuses for its prior misrepresentations lack either legal or logical foundation. Worse, Caprock has continued its misrepresentations in its *Opposition*, raising additional questions regarding its basic

²Caprock's construction permit, BPED-840626IE, expired at 3:00 a.m. local time on April 16, 1989. See, *Petition to Deny*, filed by Williams on April 25, 1989.

character qualifications. Caprock is a wolf in sheep's clothing; clever, perhaps, but by no means innocent.

Caprock's purported ignorance regarding the provisions of the Communications Act and the Commission's Rules--even if true--provides no excuse for its unlawful behaviors. Over twenty-five years ago, this matter was settled once and for all, as the Commission stated:

An individual applicant who attempts to represent himself in a Commission proceeding must assume responsibility for full knowledge of the law and rules and cannot rely on his inexperience and lack of knowledge of procedures as an excuse for his improper conduct. . . .

Western Broadcasting Co., 1 RR2d 732 (1963). See also *PacTel Mobile Access*, 63 RR2d 733 (1986). Caprock, whose dominant principal Kent Atkins is far from inexperienced,³ must be held accountable for its admitted, willful and repeated violations, whether committed mistakenly or not. Otherwise, future permittees, licensees and applicants could merely refuse to seek counsel, do whatever they want (lack of authorization notwithstanding) and then use this "ignorance" to escape Commission scrutiny. The setting of such a precedent would seriously erode the effectiveness of the Commission's

³Atkins, either as sole proprietor or dominant principal, has broadcast interests in both applications pending before the Commission and permitted and licensed stations, among them, KRGN(FM), KLMN(FM) and KENT(TV) at Amarillo, Texas. Additionally, Atkins has completed and tendered all filings on behalf of these facilities to the Commission, along with many others.

processes, which Caprock already has abused.

Notwithstanding Caprock's inability, as a matter of law, to fall back on its purported ignorance to excuse its conduct, as a matter of fact, such ignorance did not exist. Caprock's deceptive behavior in matters before the Commission is and has been pervasive and apparently extends to Caprock's representations to its own attorney. Caprock's claim, expressed on page 2 of its Opposition, that it ceased operation of the unauthorized KAMY facility of its own volition is hogwash, and is undermined by the sworn statement of Mr. Atkins, attached as an exhibit thereto. In paragraph 15 of Atkins' statement, Atkins acknowledges that it ceased operations following a call from Mr. Arthur Doak of the Commission. This call was a direct result of Williams' complaint; Caprock quit because Caprock got caught.

Similarly laughable is the notion, expressed in the same paragraph of Atkins' statement, that Caprock called counsel regarding Doak's request for information concerning the location and power of the KAMY facilities and then learned that its operations were unauthorized. Caprock's entire defense is premised upon the fact that its filings and operations were undertaken without consulting counsel at all. Opposition at 5. How is it then, that Caprock consulted the same counsel in order to find out where the station was located and what its power was? Moreover, how did Caprock

build and broadcast without reference to this information? Caprock's inconsistencies subvert its posed sincerity. The ultimate proof is in the pudding; Caprock builds wherever and whenever it wants to, without bothering with the Commission or its Rules.

Caprock's deception before the Commission is further evidenced by the telegram it sent to the Commission, which is attached to Caprock's Opposition as Exhibit 1. Caprock suggests that this exhibit ". . .clearly indicates that the applicant was not attempting to hide anything from the Commission." *Opposition* at 6. The opposite is true, however. First, as Caprock readily admits, ". . .this telegram was not an effective vehicle for obtaining program test authority." *Id.* Additionally, however, the telegram is deceptive. By its own wording, the telegram states that "In accordance with the construction permit . . . we shall begin broadcasting today" *Opposition* at Exhibit 1. However, this was a lie; Caprock actually began broadcasting at a location far away from that authorized by the construction permit. Caprock misrepresented its position before the Commission and now, it ironically seeks to use that misrepresentation as a defense against character allegations. No amount of rationalization, however, can transform the telegram from prevarication to truth.

Nor can rationalization or explanation eliminate the fact of Caprock's continuing violations. Even as Caprock pleaded innocent mistake and its counsel apologized to the Commission for its inadvertant error, Caprock continued to commit the same transgressions -- construction and operation of an FM broadcast facility without authorization from the Commission. This time, however (and, Williams suspects, last time), Caprock cannot maintain its facade of purity; Caprock, through this proceeding, stood advised.

Caprock's repeat of the Lubbock, Texas, KAMY violations have taken place in Amarillo, Texas, the community to which Caprock station KLMN(FM) is located (FCC License File No. BLED-880620KB). In Amarillo, Caprock did essentially the same thing it did in Lubbock. Caprock's authorized transmitter location, specified in its license for KLMN, is 0.4 kilometers southeast of 34th and Helium Road in Amarillo, at geographic coordinates North Latitude 35 10 21.0, West Longitude 101 57 13.0.⁴ Caprock has pending an application for modification of its underlying construction permit (FCC File No. BMPED-880321IA), seeking to relocate its transmitter and antenna to a location 2.5 miles north of Amarillo on FM 1719, at geographic coordinates North Latitude 35 15 39, West Longitude

⁴Williams requests that the Commission take Official Notice of Caprock's license for KLMN, which is contained in the Commission's files.

101 52 53, and to increase its power and antenna height.⁵ Yet, Caprock already has commenced operations from and with the facilities described in its modification application. See *Affidavit of Stevan W. White*, attached hereto as Exhibit 1. As the photographs and recordings appended to Exhibit 1 indicate, Caprock's identical violations in Amarillo continued even after Caprock (supposedly voluntarily) pulled KAMY off the air. Exhibit 1 at Attachments A, B. In fact, Caprock's Amarillo violations continued until one day following Williams' filing of a complaint with the Commission regarding the unauthorized operations of KLMN, a copy of which is attached hereto as Exhibit 3. See also Exhibit 2.

Undoubtedly, when faced with the filing of papers in Amarillo similar to the ones filed in this proceeding, Caprock again will resort to its "innocent mistake" excuses. However, how long can Caprock's deceitful excuses be excused? Assuming, *arguendo*, that Caprock's errors in Lubbock were the result of ignorance, such ignorance was not present with

⁵Apparently, the proposed location is the same location as that used by FM Broadcast Station KRGH, Amarillo, Texas, on 6000 North Western. See FCC License No. BLH-861125KA. See also *Affidavit of Mary Ellen Sera*, attached hereto as Exhibit 2. KRGH is licensed to Atkins Broadcasting, owned by Kent Atkins, Caprock's dominant principal. However, Williams notes that the geographic coordinates listed for KLMN's proposed move in its above-referenced application differ from the coordinates listed in KRGH's above-referenced license, although the address and tower specified are the same. This variance serves as yet another example of Caprock's imprecision and flagrant disregard for the Commission's Rules.

respect to the operations of KLMN at Amarillo. Rather, Caprock continued to operate gleefully until the arrival of yet another complaint at the Commission. Caprock had been counseled regarding its unauthorized operations and had received copies of Williams' complaint and Petition in this proceeding while it continued to operate an illegal facility elsewhere in Texas, and quite likely, even elsewhere. Caprock's excuses have worn thin, as have any vestiges of its "good" character.

Caprock directs great resentment towards Williams for reporting Caprock's violations to the Commission rather than privately informing Caprock, accusing Williams of choosing to ". . . secretly gather information in an effort to destroy a competitor."⁶ However, Caprock is wrong. Williams gave Caprock every conceivable benefit of the doubt. Williams did not complain, even in light of Caprock's extensive pre-authorization construction, because it is well established

⁶Interestingly, these accusations destroy Caprock's assertions that Williams has no standing to bring a petition to deny against KAMY because Williams and Caprock are not competitors. The fact is, that Williams interest in Caprock's conduct is three-fold. First, Williams is a competitor, both as an FM station in the same service area and as a Christian broadcasting entity interested in enhancing community values through its broadcasts. Second, Williams is a Commission licensee and is concerned when other permittees, licensees or applicants are exempt somehow from the expenses, delays and efforts which others must undertake in order to become public trustees. Finally, as a listener in the area, Williams has standing to challenge Caprock's character qualifications and its unlawful operations, as well as to complain regarding them.

that certain steps may be taken prior to receipt of authorization to construct: site clearance, pouring of concrete footings for a tower, installation of a tower base and anchors, installation of a new power line, purchase and on-site storage (but not installation) of radio equipment and other "preliminary steps" not having an "intrinsic" radio communication use "related to the proposed facility." *MCI Telecommunications Corp.*, 64 RR2d 672 (1988); *Christian Broadcasting of the Midlands, Inc.*, 103 FCC 2d 375 (1986), reconsideration denied, FCC 87-328 (released October 19, 1987); *King Country Broadcasters*, 55 RR2d 1591, 1592 (1984) overruled on other grounds, *Christian County Broadcasting of the Midlands, Inc.*, *supra*; *Patton Communications Corp.*, 81 FCC 2d 336, 338 (1980); *Childress Broadcasting Corp.*, 24 RR 669 (1962).

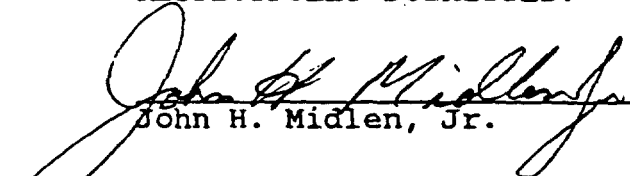
However, when KAMY began full scale operations, it became apparent to Williams that Caprock's construction was not preliminary. Accordingly, and almost immediately upon the commencement of KAMY broadcast operations, Williams complained to the Commission. Williams gave Caprock every chance to be honest; Caprock was and is not.

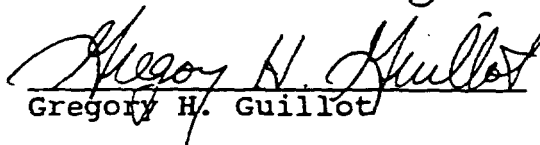
In sum, Caprock's Opposition appears to be no more than stored-up resentment. Caprock does not deny its myriad of violations. Moreover, Caprock hardly appears penitent, especially in light of its continuing violations in Amarillo,

and the misrepresentations advanced in the pleading filed in this matter. Caprock's position quite obviously is that everything is "OK" until Caprock gets caught. Unfortunately, Williams is not ready to assume the responsibility or expense for investigating each aspect of operations with respect to all of Caprock's facilities and filings. Surely, this is not what the Commission requires either.

Commission licensees, permittees and applicants assume certain responsibilities in connection with the trust bestowed upon them by the public. One of these is the duty to abide by the processes enabling placement of the public trust. Caprock's credibility is nonexistent, its qualifications less, and its violations many. Accordingly, as stated in its initial Petition to Deny, Williams seeks the maximum array of sanctions against Caprock for its unlawful and incredible activities. At minimum, Caprock's above-captioned modification application should be DENIED.

RESPECTFULLY SUBMITTED:


John H. Midlen, Jr.


Gregory H. Guillot

JOHN H. MIDLEN, JR., CHARTERED
P.O. Box 5662
Washington, D.C. 20016-5662

May 31, 1989

EXHIBIT 1

STATE OF TEXAS)
) 88
COUNTY OF POTTER)

AFFIDAVIT

BEFORE ME, the undersigned Notary Public, on this 25th day of May, 1989, personally came and appeared:

STEVAN A. WHITE

who, having been first duly sworn, did hereby state as follows:

1. My name is Stevan A. White. I have personal knowledge of the facts recited herein.

2. From October, 1986, until January, 1988, I was employed by Kent Atkins as Director of Operations for FM Broadcast Station KRGN at Amarillo, Texas. Kent Atkins is the sole proprietor of Atkins Broadcasting, licensee of KRGN. Atkins also is a principal in Caprock Educational Broadcasting Foundation, licensee of FM Broadcast Stations KLMN at Amarillo, Texas.

3. KLMN operates at the same location from which KRGN operates. Both the antenna for KRGN and the antenna for KLMN are on the same tower, located at 6000 N. Western Street, about 2.5 miles north of Amarillo, Texas. The transmitters for the two stations are within approximately 20 feet of one another. It is my understanding that KLMN should be about 8 or 10 miles away, at a different location. However, I have seen the transmitter installation for KLMN and know that this is not the case.

4. On Friday, May 19, 1989, at the request of Williams Broadcast Group, I went to the KRGN/KLMN tower site for the purpose of photographing the unauthorized location of the KLMN transmitter. Attachment A, appended hereto, consists of two photographs of the site as it appears from the front and side. The photograph at the bottom of Attachment A depicts the transmitter buildings for both stations. KRGN's "building" is the trailer which appears on the left side of the photograph; the small gray hut on the right houses the KLMN transmitter. As the black cables running from each of the structures in the photograph demonstrate, both the KRGN and KLMN transmitters are linked to the common tower appearing between them.

5. Attachment B, also appended hereto, consists of two photographs of the common tower. The picture on the left side of Attachment B shows the tower in its entirety. The photograph on the right side of Attachment B, taken with a telephoto lens, depicts the antenna for each station. KRGN's antenna consists of the eight bay configuration in the foreground of the photograph. KLMN's four bay antenna is mounted beside the KRGN structure and may be seen through the upper portion of KRGN's antenna; the KLMN antenna appears darker than the eight bay structure and appears in the background.

6. During the same day on which the attached photographs were taken, May 19, 1989, I also recorded a portion of the KLMN broadcast signal. The tape containing this recording is appended hereto as Attachment C, and included a station identification, for KLMN. The broadcasts embodied on the tape originated from the KLMN transmitter, located on the antenna shared with KRGN.

7. The photographs and recordings attached hereto are true and accurate, have not been retouched, and were taken at and from the KRGN tower site on the day referenced above.

Stevan A. White
Stevan A. White

SWORN TO AND SUBSCRIBED BEFORE ME THIS 25 DAY OF May,
1989.

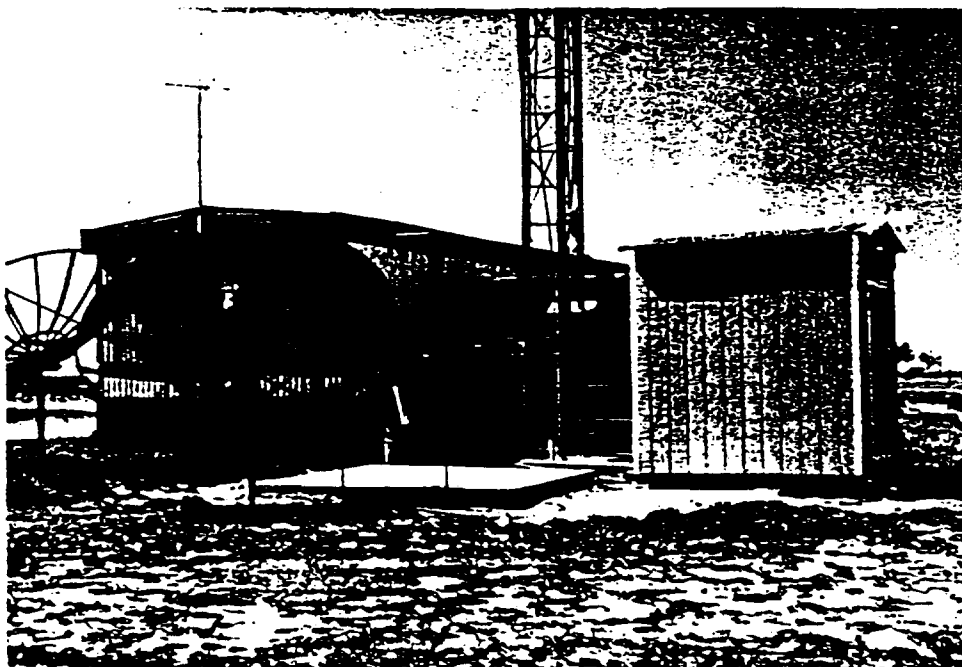
Brenda Loveday
NOTARY PUBLIC

My commission expires

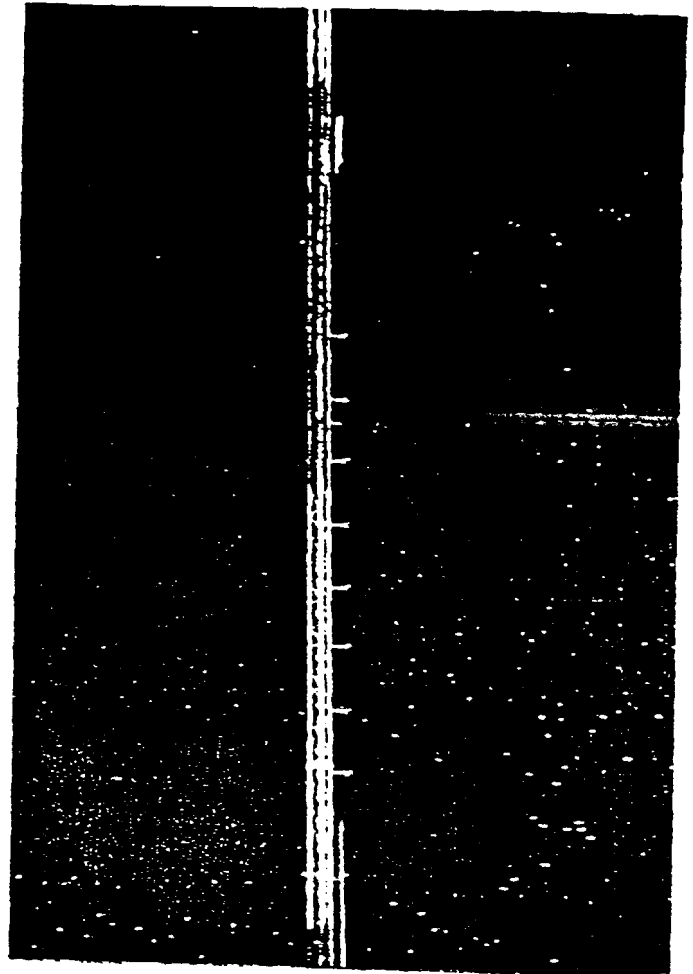
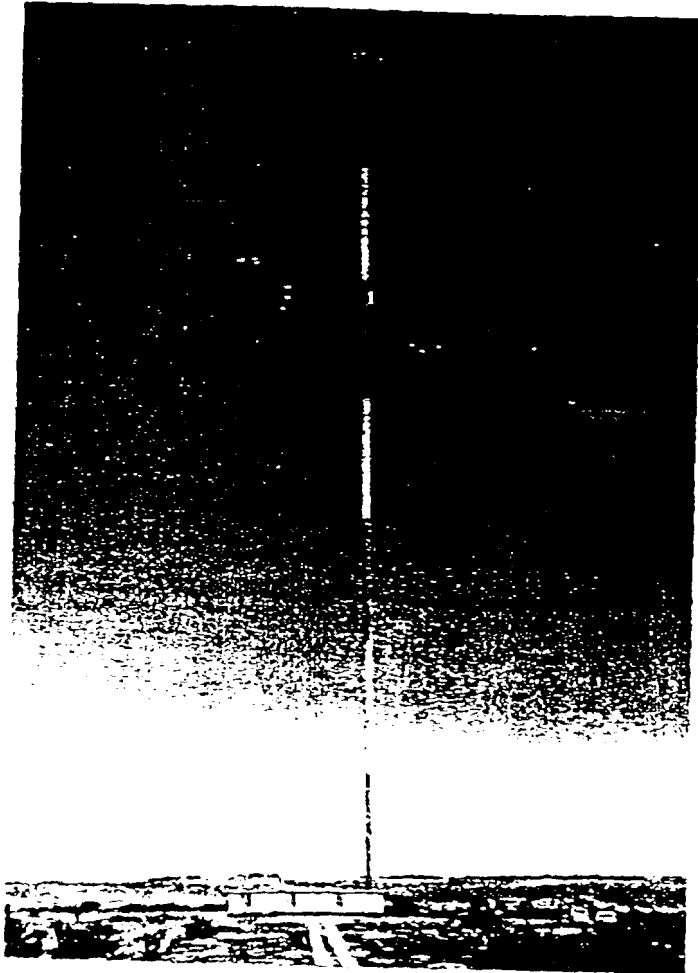
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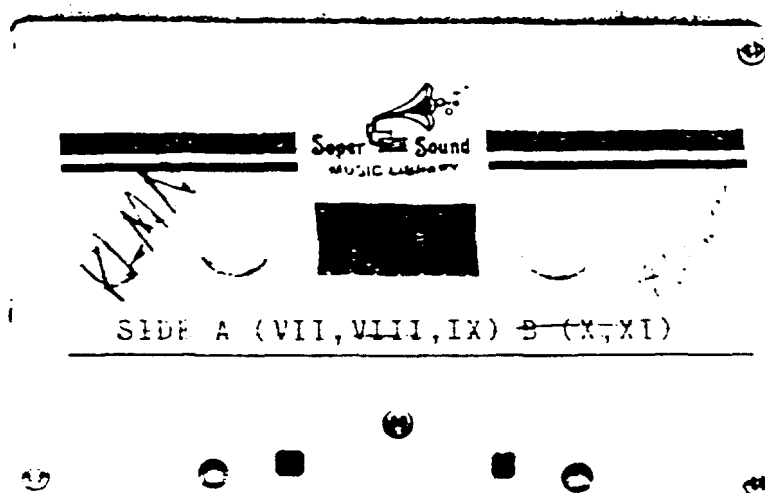
ATTACHMENT A



ATTACHMENT B



ATTACHMENT C



Actual cassette tape submitted with original only.

EXHIBIT 2

DISTRICT OF COLUMBIA)
)
CITY OF WASHINGTON)

AFFIDAVIT

BEFORE ME, the undersigned Notary Public, on this 26th day of May, 1989, personally came and appeared:

MARY ELLEN SERA

who, having been first duly sworn, did hereby state as follows:

1. My name is Mary Ellen Sera. I am Office Manager and General Secretary of the law firm of John H. Midlen, Jr., Chartered. I have personal knowledge of the facts recited herein.

2. On Wednesday, May 24, 1989, I was instructed to contact FM Broadcast Station KLMN, at Amarillo, Texas, in order to verify the location of the station's transmitter and antenna. In an attempt to comply with these instructions, at 12:06 p.m., I telephoned directory assistance for Amarillo, and asked for a listing for KLMN.

3. Upon contacting directory assistance for Amarillo, the directory assistance operator informed me that no listing existed for Station KLMN. Accordingly, I asked whether a listing was available for FM Broadcast Station KRGH at Amarillo, Texas, which I knew to be owned by Kent Atkins, a principal owner of Caprock Educational Broadcasting Foundation, licensee of KLMN. My intention was to ask someone at KRGH for the KLMN listing. The directory assistance

operator provided me with the following number for KRGN: (806) 376-5746. I then dialed the number provided.

4. My call was answered by a young gentleman, with the greeting, "KRGN." I told the gentleman that I wished to contact KLMN and asked for the station's address and telephone number. The gentleman implied that in calling KRGN, I had reached KLMN as well. The mailing address he provided to me for KLMN was Post Office Box 10050, Amarillo, Texas, 79116.


5. I then asked the gentleman where the KLMN transmitter and antenna were located. The man answered that the KLMN transmitter was located on North Western Street, on the north side of town, at North Western and St. Francis. I thanked the gentleman for the information and terminated the conversation.

6. On May 26, 1989, at approximately 11:20 a.m., I again contacted the above number and asked about KLMN. A young gentleman again answered the telephone, "KRGN." I asked the gentleman if the KLMN transmitter was located on the KRGN tower. The gentleman said that it was, but that KLMN had been taken off the air temporarily. I thanked the gentleman and terminated the conversation.



Mary Ellen Sera

SWORN TO AND SUBSCRIBED BEFORE ME THIS 26th DAY OF MAY, 1989.



Elaine M. Kelley, Notary Public

My commission expires May 31, 1994.

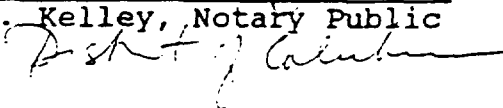


EXHIBIT 3

Law Offices
JOHN H. MIDLEN, JR.

Chartered
P.O. Box 5662
Washington, D.C. 20016-5662

(202) 333-1500
Facsimile (202) 659-0194

MAY 25 '89

OFFICE

May 25, 1989

Ms. Edythe Wise, Chief
Complaints and Investigations Branch
Mass Media Bureau, Room 8210
Federal Communications Commission
2025 M Street N.W.
Washington, D.C. 20554

Re: COMPLAINT
Station KLMN(FM), Amarillo, Texas
Caprock Educational Broadcasting Foundation
License File No. BLEP-880620KB

Dear Ms. Wise:

Williams Broadcast Group (Williams), licensee of Station KJAK(FM), Slaton, Texas, requests that you investigate, and close down, the current operation of Station KLMN(FM), Amarillo, Texas, owned and operated by Caprock Educational Broadcasting Foundation (Caprock) on Channel 206A. Caprock's authorized transmitter location, as specified in its above-referenced license, is 0.4 kilometers southeast of 34th and Helium Road in Amarillo, Texas, at geographic coordinates North Latitude 35 10 21.0, West Longitude 101 57 13.0. Caprock has pending an application for modification of its construction permit, File No. BMPED-880321IA, seeking authorization to relocate its transmitter and antenna to a location 2.5 miles north of Amarillo on FM 1719, at geographic coordinates North Latitude 35 15 39, West Longitude 101 52 53, and to increase its power and antenna height.¹ However,

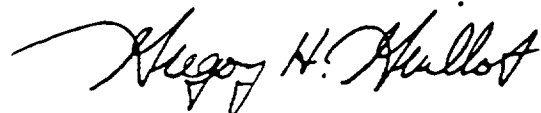
¹Apparently, the proposed location is the same location as that used by FM Broadcast Station KRGH, Amarillo, Texas, on 6000 North Western. See FCC License No. BLH-861125KA. KRGH is licensed to Atkins Broadcasting, owned by Kent Atkins, Caprock's dominant principal. However, Williams notes that the geographic coordinates listed for KLMN's proposed move in its above-referenced application differ from the coordinates listed in KRGH's above-referenced license, although the address and tower are the same. This variance serves as yet another example of Caprock's imprecision and flagrant disregard for the Commission's Rules.

Ms. Edythe Wise
May 25, 1989
Page Two

Station KLMN has commenced operations from and with the facilities described in its modification application. Accordingly, the unauthorized operation is from an entirely different location than is currently authorized. Moreover, we believe current operation to be substantially over power.

It is requested that Station KLMN be contacted², that the information contained herein be confirmed, and that the station be ordered, by telegram, to return to operation from its currently authorized facilities.

Very truly yours,



John H. Midlen, Jr.
Gregory H. Guillot
Counsel for
Williams Broadcast Group

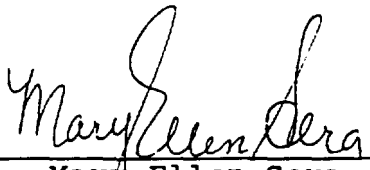
cc: Mr. Dennis Williams
Mr. Arthur E. Doak
James L. Oyster, Esq.

²For the Commission's convenience Williams notes that no telephone listing or address is available for Station KLMN; all communications with the unauthorized facility apparently must be made through the listing available for KRGH; the stations are co-located.

CERTIFICATE OF SERVICE

I, Mary Ellen Sera, do hereby certify that I have caused to be sent via First Class U.S. Mail (postage prepaid) today, May 31, 1989, a copy of the foregoing REPLY TO OPPOSITION TO PETITION TO DENY, to the following:

James L. Oyster, Esquire
Law Offices of James L. Oyster
8315 Tobin Road
Annandale, Virginia 22003



Mary Ellen Sera

EXHIBIT 4